No. 184

IN THE

Supreme Court of the United States

OCTOBER TERM—1942

HENRY A. KIESELBACH and OLGA M. KIESELBACH,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF ON BEHALF OF ISAAC G. JOHNSON AND COMPANY SUBMITTED BY JOHN JAY McKELVEY, *AMICUS CURIAE.*

JOHN JAY McKELVEY,
Amicus Curiae, submitting briefs on behalf of ISAAC G. JOHNSON AND COMPANY.

INDEX

CASES CITED

MISCELLANEOUS

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Opinions Below

The opinion of the United States Board of Tax Appeals (R. 33-37) is reported at 44 B.T.A. 279. The opinion of the Circuit Court of Appeals for Third Circuit (R. 42-50) is reported at 127 F. (2d) 359.

Jurisdiction

The judgment of the circuit court of appeals was entered April 7, 1942 (R. 42). Petition for a writ of certiorari was filed June 27, 1942, and was granted October 12, 1942, limited to the first question presented by the petition for certiorari (R. 52). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925.

Question Presented

Whether the part of the award of just compensation computed by the use of an interest factor is a part of the selling price of the property and taxable as capital gain or is a separate and distinct item of income, taxable as ordinary income.

Statutes Involved

Revenue Act of 1939, Section 119.

The Constitution of the United States, Fifth Amendment.

The Constitution of the State of New York, Article 1, Section 6.

Chapter 624, Laws of 1933, New York State.

Administrative Code, City of New York, Chapter 929, Laws of 1937, New York State, Paragraphs B15-19
B15-23.0
B15-23.0-e.
B15-28.0

Request to File Brief

Request is made for permission to file this brief under Rule 27, paragraph 9, and consent of all the parties to the case accompanies the brief.

Statement

Isaac G. Johnson and Company, a domestic corporation, organized and existing under the Laws of the State of New York, filed, on the 18th day of March, 1942, an application for refund of Federal income taxes paid for its fiscal

year ending June 30, 1939. The amount in dispute is $6,522.65. This amount consisted of $5,721.62 deficiency assessed, which was paid on January 14, 1942, and $801.03 interest, which was paid on February 24, 1942. Both said payments were made under protest.

The deficiency so assessed against the corporation was based upon the fact that the Commissioner differed with the corporation as to the status of a part of an award in condemnation, which had been made by the Court of Claims of the State of New York to the corporation for the acquisition by the State of New York of certain lands and lands under water required for the public improvement known as the straightening of the Harlem Ship Canal. The part of the award which was the subject of the difference was the amount arrived at by the Court of Claims by computing interest upon the amount found by it to be the value of the property as of the date of the taking of possession by the State. Such possession was taken and title vested under an Act of Legislature of the State of New York, to wit: Chapter 624 of the Laws of 1933. Under the terms of this act, title and the right of possession was vested in the State on September 27th, 1933.

By the terms of the act, the owner was permitted to apply to the Court of Claims to have determined the just compensation which should be paid for the property so taken. The Court of Claims, after a lengthy trial, rendered judgment in favor of the corporation for the sum of $143,183.83, which was made up of $110,755.25, the value at the time possession was taken by the State, as found by the Court, plus the amount of $32,428.58, arrived at by computing interest to the date of the entry of the judgment.

The corporation claimed the entire amount of the judgment which was paid to it as the just compensation for the forced sale of the property to the State.

Disregarding certain minor questions which have no bearing upon the question presented in the present case, the Commissioner of Internal Revenue, upon the auditing

of the return, segregated the part of the judgment which was measured by the computing of interest from the date of vesting of title to the date of the judgment, as ordinary interest income and the balance of the judgment as the compensation which the corporation had received for the property.

In computing the amount of capital gain or loss involved in the transaction for the purposes of the assessing of the income tax, it was agreed that the 1913 value should be taken as $125,000.00 (an amount much less than claimed in its original return by the corporation). Additions to this 1913 value were allowed by the commissioner of $19,950.17, making a total value at the time the State took possession of $144,950.17.

It will thus be seen, from a comparison of the conceded value of the property at the time of the taking, with the amount which has been treated by the Commissioner as the compensation paid by the State, that the corporation suffers a heavy loss on the property thus forcibly taken from it and that; in addition to such capital loss, it suffers a further loss to the extent of the tax assessed as a deficiency on the balance of the judgment which the commissioners treated as ordinary interest income, the amount of this deficiency paid under protest by the corporation being $6,522.65.

The same question is, therefore, presented upon the above state of facts as that presented in the case before the Court, to wit,—Is that part of a judgment or award in condemnation which is arrived at by computing interest upon the valuation given to the property at the time of the vesting of title to be treated as a part of just compensation to the owner for the taking or as ordinary interest income?

Summary of the Argument

The facts as above recited in respect to the position of the corporation mentioned present a very common situation upon which the decision of the single question raised in the case before this court will have an important bearing.

The Johnson case indicates an extreme to which a decision, holding that interest which enters into an award of just compensation is to be treated as ordinary income, may lead. This extreme result, while not in prospect upon the particular facts of the Kieselbach case, is one which has been and is likely to be of such frequent occurrence as to entitle it to the consideration of the Court in a final authoritative decision of the question.

The inevitable result of the Commissioner's contention if upheld will be to leave many owners whose property is forcibly taken from them in the unfortunate position of suffering a heavy capital loss while at the same time paying taxes upon an illusory gain which is characterized as interest income, unless there be some difference in principle between such a case and a case where the base amount of the compensation exclusive of the added increment is in excess of the value given to the property for the purposes of the tax. Under such circumstances, the tax paid upon the basis of "ordinary interest income" might be little more than if paid on the basis of the whole award being treated as capital gain; though in the case of an individual owner the length of time for which the property was held would, of course, enter into the result.

Substance and not form is under the decisions of this court recognized as controlling in fixing the status of the parties concerned under statutory provisions, contracts or other governing documents.

The principle here involved is one of broad application and should be defined in a manner which will be recognized as controlling by the taxing authorities wherever involved in the facts brought before them.

ARGUMENT

I

Just compensation, in the case of a forcible taking under power of eminent domain, must, under the provisions of both Federal and State Constitutions, leave the property owner whole insofar as his pecuniary status is concerned.

The power of eminent domain is one which is exercised in the public interest and it is one of the foundation principles in our law that the rights of the individual shall not be invaded and his property taken away for public use without justly compensating him therefor.

United States Constitution—Fifth Amendment
New York State Constitution—Article I, Sec. 6.

The term "just compensation" has been sufficiently studied and defined, both in the statutes and in the case decisions, to give it a meaning which should no longer involve uncertainties.

This Court has stated very simply and plainly what just compensation means. It means that "the Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken."

In determining whether or not this obligation has been fulfilled, the Courts and other tribunals empowered to deal with the question, have too frequently differed in their conclusions and thus we have, in the cases, differences upon which arguments may be based for reaching, on some particular state of facts, wholly opposite conclusions.

These diversions from the straight and narrow path to the objective as above defined have usually found correction in some outstanding decision, broad and comprehensive in its import and effect, re-asserting and bringing to the front the underlying basis upon which the right of

eminent domain rests, namely: THE OBLIGATION "TO PUT THE OWNERS IN AS GOOD POSITION PECUNIARILY AS IF THE USE OF THEIR PROPERTY HAD NOT BEEN TAKEN".

II

Where property is taken under the right of eminent domain and the owner required to wait until a final court determination of the amount of just compensation to which he is entitled, such compensation to be just must necessarily be sufficient to make him pecuniarily whole at the time of the receipt thereof.

It is quite obvious that, in many cases, an owner, whose property is taken, loses the income therefrom or the use thereof pending lengthy litigation as to the amount which should be paid to him. This loss is a real pecuniary loss, resulting from the exercise of the right by the taking authority. Compensation cannot be just which does not include a sum which will be the equivalent of this loss. Therefore, the statutes provide, in some States (New York among them), that an award must include such sum and declare it to be a component part of just compensation.

Chapter 929 of the Laws of 1937, Administrative Code. This law provides (Section B15-23.0-a.):

> "The final decree shall also contain a statement that the amounts set opposite the respective damage parcel numbers in the column head 'final awards' in the tabular abstract of awards for damage constitute and are the just compensation which the respective owners are entitled to receive from the city."

And a final award must include interest on the damages (B15-28.0-a):

> "from the date of the filing of the final decree, or if title to the real property acquired shall have vested

in the city prior thereto, from the date of such vesting,"

The fact that the measure adopted to determine the amount of such increment is a prevailing interest percentage does not change its character.

It lacks the essential feature, which money received must have, to be interest. To use the language of this Court:

> "We are dealing with the context of a revenue act and words which have today a well-known meaning. In the business world 'interest on indebtedness' means compensation for the use or forebearance of money. In absence of clear evidence to the contrary, we assume that Congress has used these words in that sense."

Deputy v. *Dupont*, 308 U. S. 488 (1939).

A statutory recognition of the real character of the so-called "interest" which must be included in a final award is found in the language of B15-23.0-e of the New York Statute above referred to, which provides:

> "e. In the case of an assessable improvement proceeding, interest at the legal rate, upon the sum or sums to which owners are justly entitled upon the date of the vesting of title in the city, from such date to the date of the final decree, shall be awarded by the court *as part of the compensation to which such owners are entitled.*" (Italics ours)

The above statutory provisions in New York relate to condemnation proceedings by the City of New York but are expressive of the principle applicable in all cases of forcible taking under power of eminent domain.

III

The matter is one of substance and not of form. This Court will disregard form and look to the substance in determining the rights and obligations of the parties.

The use of the word "interest" in the statutes, awards or judgments, cannot change the essential character of the thing for it is not in fact interest in the sense that term is understood in the business world. It is not payment for the use of borrowed money but a sum, fixed by adopting a percentage measurement, necessary to bring the compensation awarded up to the standard of the just compensation to which the owner is entitled under Federal and State Constitutions.

Deputy v. *Dupont—supra;*
Old Colony R. R. v. *Commissioner*, 284 U. S. 552 (1937);
Seaboard Air Line R. R. Co. v. *U. S.*, 261 U. S. 299.

In the case last cited, the Court says:

> "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of the value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added."

Again this Court has stated:

> "Section 177 (prohibiting *interest* on claims against the U. S.) does not prohibit the inclusion of the additional amount for which petitioner contends. *It is not a claim for interest within the purpose or intention of that section.* Acts of Congress

> are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken." (Italics ours)
>
> *Phelps* v. *U. S.*, 274 U. S. 341.

The above interpretation of the word "interest" on the principle that substance and not form is controlling is wholly in line with the position consistently taken by this Court, a very striking instance of which, though in the field of contracts, is found in the recent case of *Helvering* v. *Le Gierse*, 312 U. S. 531.

IV

For the purpose of fixing just compensation for property taken by right of eminent domain, the taking cannot be regarded as complete until the amount is determined and final order or judgment entered therefor.

Confusion of thought results from losing sight of the above principle. Such confusion is one of the causes of the failure, at times, by the Courts and Taxing Authorities to grasp the true relation of *just compensation* to the taking.

By assuming that the taking is a completed transaction between buyer and forced seller on the date title is vested or possession taken, the mistake is made of regarding the whole question as then one of value at that date; ergo, anything added to such amount must be interest on capital. Thus a false conclusion from a false premise is born.

On the other hand, if the true nature of the transaction be understood, the transaction is not complete, the sale is not consummated, until the price is fixed. Taking title and possession are acts which are only part of the transaction. They may even be illegal acts, as in the case of the Shoshone Tribe lands (299 U. S. 476). They only ripen

into a legally completed sale when there comes into being an obligation to pay a definite sum, which can be only upon the entry of final judgment. It is the inability of the machinery for arriving at such definite price, concidently with the entry of such final judgment, which obliges the Court to take a prior date, as of which value of the property and other elements of damage are fixed, and then to adopt a rule for adjusting that value to the later date when the obligation becomes definite and certain, by the entry of final judgment.

V

This Court has definitely determined in analogous cases that interest on an award is to be treated, not as ordinary interest, but as part of just compensation.

The identical question as to the status of interest on an award has been before the Supreme Court in connection with a number of situations where the determination was essential to the meting out of what this Court deemed to be justice to the parties. In a comparatively recent case, the late Mr. Justice Cardozo rendered an opinion which must be regarded as a determination by this Court of the question. There the Government had taken, without authority of law, land from the Shoshone Indian Tribe. Many years afterwards, the taking was confirmed by Congress. The question of the compensation to be paid was before this Court for determination. Under the provision that interest may not be allowed on claims against the United States, it was urged that no interest could be allowed on the value fixed as of the date of the taking. Justice Cardozo states:

> "The claimant's damage includes such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such

other standard as may be suitable in the light of all of the circumstances."

Shoshone Tribe v. *U. S.*, (1936) 299 U. S. 476, p. 496.

In a prior decision of this Court, involving the same point, where the United States in the World War took possession of property at the Bush Terminal, which was under lease to the plaintiff, the plaintiff claimed, in addition to the amount fixed as reasonable compensation for his lease, an additional amount equivalent to interest. Section 177 of the Judicial Code, provides:

"No interest should be paid on any claim up to the time of rendition of judgment unless upon a contract expressly stipulating for its payment".

Justice Butler says:

"Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim of interest within the purpose or intention of the section. * * * The government obligation is to put the owners in as good a position pecuniarily as if the use of the property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the added amount claimed."

Phelps v. *U. S.* (1927), 274 U. S. 341.

That the lower Courts and the tax tribunals have in general followed the principle thus recognized by the Supreme Court seems clear—*Barbour* v. *Commissioner*, (July, 1941) 44 B. T. A. 1117.

Seaside Improvement Co. v. *Commissioner*, 105 Fed. (2nd) 990;

Appleby's Estate v. *Commissioner*, 78 Fed. (2nd) 700;

Matter of City of New York, 222 N. Y. 370;

Matter of Starr, 198 A. D. 859.

VI

The distinction between capital gain and ordinary income was created for a purpose by Congress. That purpose can only be served by the treatment of an award in condemnation as a single consideration for the property taken.

Where the treatment of the so called interest which is required to be included in the amount of an award in order to provide just compensation to the owner will affect the position of the owner with respect to capital loss or gain, the purpose of the law creating a distinction between capital gain and ordinary income cannot be carried out if the award be divided into two parts and the interest part be taxed as ordinary income.

The Chief Justice of this Court has stated that the provisions of the Act of 1921, reenacted in 1924, which created such distinction—

> "were adopted to relieve the taxpayer from the excessive tax burden on gains resulting from conversion of capital investment and remove the deterrent effects of the burden on said conversions".
>
> *Burnett v. Harmel*, 287 U. S. 103, p. 106.

Where the facts are as in the *Johnson* case and a capital loss faces the owner by reason of the taking, to add to his burdens by treating a part of his award as ordinary income and taxing it as such nullifies the relief intended to be given by the change in the law. It strengthens the "deterrent effects of the burden on the conversion".

Where the question of exemption of certain kinds of ordinary income has come up and the claim for exemption as related to interest on an award treated separately from the amount of the value as fixed, the Courts have declined to treat the interest separately and have denied the claim that it should be so treated as interest on an obligation of the state and, therefore, exempt. Even where the land taken

under condemnation proceedings was subject to agreement as to deferring the payment therefor, the Court says:

> "While the contract to defer payment was voluntary, the taking was not, all the proceedings being under the power of eminent domain and necessarily compulsory upon the appellant. The compensation, therefore, had to be that required in condemnation proceedings, namely, the full equivalent of the value of the land at the time of the taking. Under such circumstances, the interest is conceded to be a part of the award tax, and essential to just compensation for the land where it is taken before full payment is made."
>
> *Holley* v. *U. S.* (U. S. Circuit Court of Appeals, 6th Circuit, January, 1942.) C. C. H. vme. 4, section 9205.

Chief Justice Hiscock of the New York Court of Appeals says, with reference to a claim for interest upon an amount fixed as the value of easements destroyed:

> "Damages in a street closing proceeding should include not only the value of the easements taken or destroyed, but also interest thereon from the date when taken to the date of the report; that such interest is allowable as part of the damages which the property owner has sustained not under any explicit provision of the statute but under the right to due compensation for taking his property, and that such interest need not be separately stated in the report. We thus see that interest on the value of the easements is included in the award under the constitutional requirements for due compensation for property which has been taken. If the property owner received simply the value of his easements without any interest to the time of the award so made, he would not receive such compensation."
>
> *Matter of City of New York*, 222 New York 370.

And in another case, the Court of Appeals holds that a clause in the City Charter which provides that the owner

to whom an award was made in condemnation proceedings "shall not have an action at law against the City of New York for such awards, costs or expenses", takes away the right of an action at law for the interest on the award, since it is a part of the award.

Woodward Brown Co. v. *City of New York*, 235 N. Y. 278.

VII

From the standpoint of tax liability no gain can be predicated upon a forced sale under eminent domain until the base value agreed upon or otherwise fixed for tax purposes is fully covered and the amount received however named must be first applied against such value.

Regardless of the status given to the interest element in an award, it cannot be segregated and taxed separately as ordinary income if the base value for tax purposes exceeds the amount of the award or requires, to be fully covered, some part of the interest element.

The above situation has arisen in connection with the claims made for property destroyed or taken by the German Government in the course of the World War and, where the Mixed Claims Commission held funds consisting of principal deposited to cover the claims and accumulated interest thereon, the question came up as to the taxable status of the interest.

The Court says:

> "In order to arrive at gain or loss, there must be withdrawn from the *gross proceeds* an amount sufficient to restore capital that existed at the commencement of the period under consideration." Doyle v. Mitchell, 247 U. S. 179.

Followed in *Commissioner* v. *Speyer*, 77 Fed. (2nd) 824.

In another case, an award of $48,000.00 principal and $21,138.34 interest was paid. The Board of Tax Appeals for income tax purposes held the property had a base value for tax purposes of not less than the total amount paid, but nevertheless held that the interest was taxable as ordinary income. On appeal, the Appellate Court held:

> "The aggregate of the two sums just equals the value of petitioner's property at the date of acquisition. She got only her original cost for value; and, since that is the test by which to determine either gain or loss, it was obvious that there was no profit and so no income."

Drier v. *Helvering*, 72 Fed. (2nd) 76.

Conclusion

It seems clear that there is a well defined meaning to "just compensation" in the case of awards in condemnation or other payments analogous thereto and that such meaning excludes the idea that a portion of such compensation may be segregated from the whole amount and treated differently for tax purposes.

In the instant case, the interest element in the award should not be treated as ordinary income by the taxing authorities but is a part of the just compensation to which owner was entitled for a forced taking and is subject only to such tax as may accrue thereon by reason of capital gain.

Respectfully submitted,

JOHN JAY McKELVEY,
Amicus Curiae, submitting briefs on behalf of ISAAC G. JOHNSON AND COMPANY.

SUPREME COURT OF THE UNITED STATES.

No. 184.—October Term, 1942.

Henry A. Kieselbach and Olga M. Kieselbach, Petitioners, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 4, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari was granted limited to a single narrow point in the law of income taxes. The sum in question was received as part of the compensation in a condemnation proceeding instituted by the City of New York. Payment was made several years after the actual taking. The issue concerns the nature of that portion of the payment which is called "interest" by the Greater New York Charter and which the owner must receive, in addition to the value of the property fixed as of the time of the taking, to produce, when actually paid the full equivalent of that value. Was this portion a capital gain or ordinary income?

The writ was granted because of conflict upon the point between this case below, *Commissioner* v. *Kieselbach et al.*, 127 F. 2d 359 (C. C. A. 3), and *Seaside Improvement Co. v. Commissioner*, 105 F. 2d 990 (C. C. A. 2).

The taxpayers owned a piece of realty in the City of New York. In December, 1932, that city's Board of Estimate passed a resolution which directed that upon January 3, 1933, the title in fee to a large part of the parcel would vest in the city. The condemnation proceeding, of which the resolution was a part, was pursuant to Sec. 976 of the Greater New York Charter, which provides in part as follows:

"Upon the date of the entry of the order granting the application to condemn, or of the filing of the damage map in the proceeding, as the case may be, or upon such subsequent date as may be specified by resolution of said board, the city of New York shall become and be seized in fee of or of the easement, in, over, upon or under, the said real property described in the said order or damage map, as the board of estimate and apportionment may determine, the

same to be held, appropriated, converted and used to and for such purpose accordingly. Interest at the legal rate upon the sum or sums to which the owners are justly entitled upon the date of the vesting of title in the city of New York, as aforesaid, from said date to the date of the final decree shall be awarded by the court as part of the compensation to which such owners are entitled."

The city took possession on the date named in the resolution and received all rents thereafter accruing. The Supreme Court of New York entered its final decree in the proceedings on March 31, 1937. It was for $73,246.57 and was stated to be the just compensation which the owners were entitled to receive. Payment was made on May 12, 1937. It has been stipulated that:

"The amount of said payment was computed by adding to the principal amount of $58,000.00, interest thereon as provided by Section 976 of the Greater New York Charter, in the sum of $15,246.57, computed at the rate of 6% per annum from January 3, 1933, to May 12, 1937, or a total of $73,246.57."[1]

We accept as a fact that the $58,000, principal amount just referred to, was, as petitioners allege, an award to them. We assume it was the value on January 3, 1933, of this property then taken by the city.

Section 22 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, 1657, contains the general definition of gross income. It reads as follows:

"(a) *General Definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ."

The taxpayers' basis on the condemned property was around $42,000. In their original return the difference between the basis and the total sum received was treated as capital gain and only a percentage was returned as income pursuant to Sec. 117.[2] The

[1] No question is raised involving the accuracy of this computation. While Sec. 976 requires interest only to the date of the decree, Sec. 981, Greater New York Charter, as amended by Laws of 1932, c. 391, requires interest on the decree. Matter of City of New York (Chrystie St.) 264 N. Y. 319.

[2] Section 117 reads as follows:

"(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale

Commissioner assessed a deficiency on the portion of the award computed as interest on the ground that such portion was ordinary income. The Board of Tax Appeals reversed the Commissioner and the Circuit Court of Appeals, in turn, held with the Commissioner.

We agree with the Court of Appeals. The sum paid these taxpayers above the award of $58,000 was paid because of the failure to put the award in the taxpayers' hands on the day, January 3, 1933, when the property was taken. This additional payment was necessary to give the owner the full equivalent of the value of the property at the time it was taken. Whether one calls it interest on the value or payments to meet the constitutional requirement of just compensation is immaterial. It is income under Sec. 22, paid to the taxpayers in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken. It is not a capital gain upon an asset sold under Sec. 117. The sale price was the $58,000.[3]

The property was turned over in January, 1933, by the resolution. This was the sale. Title then passed. The subsequent earnings of the property went to the city. The transaction was as though a purchase money lien at legal interest was retained upon the property. Such interest when paid would, of course, be ordinary income.

From the premises that the value at time of the taking plus compensation for delay in payment equals just compensation, *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 123;[4] and that a good measure of the necessary additional amount is

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or exchange of a capital asset shall be taken into account in computing net income:

"40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

"30 per centum if the capital asset has been held for more than 10 years.

"(b) *Definition of Capital Assets.*—For the purposes of this title, 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), . . ." 49 Stat. 1691.

[3] The involuntary character of the transaction is not significant. Helvering v. Hammel, 311 U. S. 504, 510.

No review is sought of the holding that transfer of property through condemnation proceedings is a sale within the meaning of Sec. 117 of the Revenue Act of 1936. Commissioner v. Kieselbach, 127 F. 2d 359, 360.

[4] See also Shoshone Tribe v. United States, 299 U. S. 476, 496; Phelps v. United States, 274 U. S. 341; Brooks-Scanlon Corp. v. United States, 265 U. S. 106; Liggett & Myers v. United States, 274 U. S. 215.

interest "at a proper rate," *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306, petitioner contends that as just compensation requires the payment of these sums for delay in settlement, they are a part of the damages awarded for the property. But these payments are indemnification for delay, not a part of the sale price. While without their payment just compensation would not be received by the vendor, it does not follow that the additional payments are a part of the sale price under Sec. 117(a). The just compensation constitutionally required is not the same thing as the sale price of a capital asset.[5]

In *Seaside Improvement Co.* v. *Commissioner*, 105 F. 2d 990, 994, an opposite conclusion apparently was reached by treating the additional payments as part of the purchase price as well as part of "just compensation."[6]

Petitioners urge that the additional sum paid should be construed as a part of the sale price in analogy to decisions that such sums, when paid in condemnation proceedings by a state, are not interest entitled to exemption under Sec. 22(b)(4), Internal Revenue Code, as "interest upon the obligations of a state."[7] The cases cited construe the quoted phrase as designed to protect the states' borrowing power. In any event the question here is not whether these sums are interest. They may not be interest and yet be other than part of the sale price.[8] If not interest they may be compensation for the delay in payment.

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[5] The same principle is applicable to the New York decisions, holding that interest is a part of the condemnation award. Just compensation requires satisfaction for the delay by payment of the additional sums. Matter of City of New York (West 151st St.), 222 N. Y. 370, 372; In the matter of Minzesheimer, 144 App. Div. 576, 579, affirmed 204 N. Y. 272; Matter of City of N. Y. (Bronx River Parkway), 284 N. Y. 48, 54. The obligation to pay its value arises when the property is taken. Title then passes. Kahlen v. State of New York, 223 N. Y. 383, 389. Woodward Brown Realty Co. v. City of New York, 235 N. Y. 278, is not to the contrary. It deals with the unity of a right of action on an award with interest, holding only one proceeding is authorized against the condemnor.

[6] "Such additional sums are not considered normal interest but part of the compensation awarded for the property taken." 105 F. 2d at 994.

[7] Holley v. United States, 124 F. 2d 909 (C. C. A. 6, 1942); Pocahontas v. United States, 31 F. Supp. 161 (Ct. Cl. 1940); Williams Land Co. v. United States, 31 F. Supp. 154 (Ct. Cl. 1940); Baltimore & Ohio R. Co. v. Commissioner, 78 F. 2d 460 (C. C. A. 4, 1935); U. S. Trust Co. of New York v. Anderson, 65 F. 2d 575 (C. C. A. 2, 1933).

[8] "Nor is it quite accurate to say that interest as such is added to value at the time of taking in order to arrive at just compensation subsequently ascertained and paid." United States v. Klamath and Modoc Tribes, 304 U. S. 119, 123.

Other contentions are made by the petitioners. It is said that in other situations interest on delayed payments has been treated as part of the principal received and not as normal income.[9] By analogy it is urged that the same principle be applied here. The first three cases in the preceding note involved payments of awards in liquidation of claims against Germany allowed by the Mixed Claims Commission. See Settlement of War Claims Act of 1928, 45 Stat. 254. As the aggregate payments did not equal the taxpayers' basis, the decisions refused to consider as income the portions designated as interest on the ground that in liquidation the investment first must be restored before income is realized. *Koninklijke Hollandische Lloyd* v. *Commissioner* and *Consorzio Veneziano etc.* v. *Commissioner* applied the rule that payment for deferred compensation was not interest under Sec. 119(a)[10] of the Revenue Act of 1932 or 1928. These decisions obviously are not in point on the question whether the additional payments in the present case are part of the sale price or other income under Sec. 22. Nor do we find persuasive the cases refusing to allow an installment purchaser an interest deduction because of his deferred payments where the purpose was an arrangement for the payment of the purchase price.[11] In the present case, the purchase price was settled as of January 3, 1933, when the property was taken over.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[9] Helvering v. Drier, 79 F. 2d 501 ((C. C. A. 4, 1935); Commissioner v. Speyer, 77 F. 2d 824 (C. C. A. 2, 1935); Drier v. Helvering, 72 F. 2d 76 (App. D. C. 1934); Consorzio Veneziano di Armamento e Navigazione v. Commissioner, 21 B. T. A. 984 (1930); N. V. Koninklijke Hollandische Lloyd (Royal Holland Lloyd) v. Commissioner, 34 B. T. A. 830 (1936).

[10] This section specifies interest on interest bearing obligations of residents as one of the items of income from sources within the United States.

[11] Hundahl v. Commissioner, 118 F. 2d 349 (C. C. A. 5th, 1941); Henrietta Mills v. Commissioner, 52 F. 2d 931 (C. C. A. 4th, 1931); Pratt Mallory Co. v. United States, 12 F. Supp. 1020 (Ct. Cl. 1936); Daniel Brothers Co. v. Commissioner, 28 F. 2d 761 (C. C. A. 5th, 1928).